VIRGINIA LAW REGISTER.

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Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at Bedford City, Va.; BUSINESS communications to the PUBLISHERS.

MISCELLANEOUS NOTES.

THE COURT OF APPEALS adjourned at Staunton on the 8th of October, after a laborious session of one month, to convene in Richmond on the 12th of November. The business transacted at Staunton will appear from the following statement:

Cases on docket	60
Not ready for hearing	13
	47
Continued	4
	43
Dismissed	5
Whole number argued or submitted on briefs	38
Opinions prepared and delivered	25
In hands of court for preparation of opinions	13

Opinions in these 13 cases will, no doubt, be prepared in vacation and handed down when the court reconvenes in Richmond. How much *rest* will the Judges have during the vacation?

Of the cases decided		25
Ordered to be reported	12	
Not to be reported	13	25
The cases (13) in the hands of the court are regarded as important, and all will probably be ordered to be reported, making in all to be reported 12x13=		25
Not to be reported	13	38
Number of applications for appeals and writs of error considered and determined since the adjournment at Wytheville, August 10, 1895		33
Granted	24	
Refused	9	33

Whole number of applications at all places of session considered and acted upon since the present Judges entered into office, January, 1895..... 201
Granted 130
Refused ..... 71—201

Surely, this is a good business record for the court.

In answer to a letter of inquiry, the clerk at Richmond informs us that, as of the 14th of October, the docket for the next term there, beginning November 12, stands:

Commonwealth's docket..... 12
Privileged docket 3
Regular argument docket 186
201

It is probable that the number of cases may be slightly increased before the commencement of the term.

ERRORS IN TABLE OF CASES REPORTED IN 32 GRATTAN.—The table of "Cases Reported" in the 32d volume of Grattan's Reports is defective, and has probably misled many lawyers in their search for cases in this volume. The following cases are omitted:

B. & O. R. Co. v. Noell, 394.
Circle *and* Womack, 324.
Compton v. Tabor, 121.
Davis *and* Tilson, 92.
Garber's Adm'r v. Armentrout, 235.
Gentry *and* Allen, 254.
Heiskell's Trustee *and* Preston, 48.
Noell *and* B. & O. R. Co., 394.
St. John v. Alderson, 140.
Sult *and* Grubb's Adm'r, 92.
Womack v. Circle, 324.

JUDGE LAMB'S SKETCH OF PROFESSOR MINOR.—We present in this issue a sketch of the life and character of the late Prof. John B. Minor, prepared by Hon. James C. Lamb, Judge of the Chancery Court of the city of Richmond, accompanied by a portrait of Professor Minor. We take this public method of expressing to Judge Lamb our congratulations upon the admirable manner in which he has performed his task. The pen portrait which he draws of the distinguished teacher will be recognized as a faithful one by thousands who knew and loved him. The sketch is not a mere eulogy, nor an ideal portrait drawn from the depths of the author's reverent affection. To our mind, Judge Lamb's greatest success in this labor of love has been in the marked faithfulness with which he has outlined an almost ideal character, without going beyond the limits of truth.

CHARGE BY RAILROAD COMPANY FOR DEMURRAGE.—The case of *N. & W. R. Co. v. Adams*, 90 Va. 393, in which it was held (with two judges dissenting) that a

charge of one dollar a day for every day after three days that cars remain unloaded after notice to the consignee of their arrival, is reasonable and valid, is reported, with extensive annotations, in 44 Am. St. Rep. 916. The editor asserts that the law of the subject is yet in its infancy, and that but few cases involving the question have yet been reported. The only two cases which seem to take the contrary view are *Chicago etc. R. Co. v. Jenkins*, 103 Ill. 588, and a Nebraska case based on the Illinois case—*Burlington etc. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390. Amongst the cases cited in favor of the doctrine are *Miller v. Georgia R. Co.* 88 Ga. 563 (30 Am. St. Rep. 170); *Baumbach v. Gulf etc. R. Co.* 4 Tex. Civ. Ap. 650; *Miller v. Mansfield*, 112 Mass. 260; *Kentucky etc. Co. v. Louisville etc. R. Co.*, 11 R'y and Corp. Jour. 49.

DESTRUCTIVE FIRE AT THE UNIVERSITY OF VIRGINIA.—The destruction by fire on Sunday, October 27th, of the Rotunda and Annex of the University of Virginia is nothing less than a public calamity.

The mere pecuniary loss, while it is great, is by no means all or the most serious part of it. The associations which clung about the central dome of Jefferson's child of his old age were an inestimable inheritance. The greater part, too, of the original nucleus of the Library, selected and purchased by him, and placed upon the shelves under his own eye in the last year of his life, was destroyed; much of it now cannot be replaced.

The fire is said to have originated in the northwestern corner of the Annex. If the water supply had been adequate at the time, it is probable that the flames might have been arrested in their incipiency. But owing, as it is stated, to temporary causes, the supply was insufficient, and the flames rapidly gained such headway as to be beyond the control of such resources as the University and the town of Charlottesville possessed. In consequence, the venerable, beautiful, and historic Rotunda—the Pantheon of the Sciences—and the greater part of its valuable contents, were destroyed.

It is of good omen—showing how deep is the hold on the affections of the people that their University has won—that from every quarter, voiced by the press, the demand has been expressed for prompt and complete restoration.

We cannot forbear to express the hope that the General Assembly, as soon as it shall meet, will take hold of the work of restoration in a spirit of enlightened liberality; and, without curtailing the customary annual appropriation, will provide an ample fund to restore the ruined buildings as speedily and thoroughly as practicable, in a permanent and imperishable manner; and replace or make good to the Library at least all that has been lost.

For works of art and ornament reliance may be placed on the liberality of private citizens, but for the rebuilding of the burned structures only the State can be looked to for the needful action, without delay.

REPORT OF THE PROCEEDINGS OF THE VIRGINIA STATE BAR ASSOCIATION.—We have received the report of the proceedings of the Bar Association of this State, at its seventh annual meeting, held at the White Sulphur Springs, in August last. It is a handsomely printed volume of 296 pages, bound uniformly with the

previous volumes, this being Volume VIII. of the series. We observe a new departure in the insertion of several portraits in this volume, one of Mr. Chas. M. Blackford, the retiring President; one of Judge Roger A. Pryor, the invited orator; and a third of the late lamented founder of the Association, Francis H. McGuire. Those members who preserve their volumes of these reports will soon have a valuable collection of papers, whose historical interest will increase rather than decrease with advancing age. Of course each of the volumes contains a lot of rubbish, interesting only to the particular individual responsible for it, but on the whole the series is well worthy of preservation.

THE "LAW BOOK NEWS."—Lawyers who desire to keep up with, or out of the way of, the avalanche of law books now being issued from the press, cannot do better than read this very excellent journal, issued monthly by the West Publishing Company of St. Paul. We have learned to look forward with pleasurable anticipations to its coming, and always find in it much that is interesting and valuable. In each number are published signed reviews by leading lawyers, of new law books, announcements of books to be published, law book errata, personal and miscellaneous notes of interest to the profession, editorial matter, and, not the least valuable of its features, a topical index of articles in current periodicals on legal subjects, giving the name of the periodical, place of publication and price of single numbers. We commend it to our professional brethren as well worth the subscription price of one dollar.

JURIES AS JUDGES OF THE LAW.—The much-mooted question whether juries are judges of law as well as of fact, in criminal cases, is thoroughly ventilated by the Supreme Court of the United States in *Sparf v. U. S.* 156 U. S. 51. Rarely has that learned court displayed more learning or more research than are exhibited in its published deliberations in this case. And yet we are but little nearer its solution than before—the court being divided upon the question, and the dissenting opinion being strong enough to largely weaken the force of the decision. The opinion of the majority was delivered by Mr. Justice Harlan, and covers more than fifty pages. The dissenting opinion is by Mr. Justice Gray, and occupies seventy-two pages. Mr. Justice Shiras concurs in the dissent.

It was admitted by either side that the jury had the physical power to acquit, regardless of the court's instructions, but the main question was whether the lower court had erred in instructing the jury that they were bound to accept the law as given to them by the court, and by a further instruction that there was nothing in the case to reduce the crime below the grade of murder, and that they could not properly find it to be manslaughter—or, in other words, that they must either find the accused guilty of murder or acquit him. The case was of first impression in the Supreme Court, and afforded an excellent opportunity for juridical argument—an opportunity of which the court freely availed itself. The history of the subject is traced from Magna Charta, through the black-letter times of Bracton, Vaughan and Plowden; the more modern English reports seem to have been thoroughly ransacked; and it would be a tiresome task to enumerate the cases cited from the American courts, State and Federal. Story and Shaw and

Curtis, with numerous lesser lights in America; Lord Raymond, Lord Abinger, Lord Mansfield, Mr. Stephens and others, are arrayed on the one side, while the minority entrench themselves behind such names as Coke, Bacon, Littleton, Hall, Somers, Holt, Camden, and even John Milton, and, in our own country, Chancellors Kent and Walworth, Marshall, Sharswood, Jay, Chase and others.

After reading the views of both sides, one is apt to find himself agreeing with the one or the other according to which opinion he has read last. The following extract from Mr. Justice Harlan's opinion presents briefly the views of the majority:

Any other rule than that indicated in the above observations would bring confusion and uncertainty in the administration of the criminal law. Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well as the facts—if the function of the court be only advisory as to the law—why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law?

Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty or property according to such legal principles as in their judgment were applicable to the particular case being tried. If because, generally speaking, it is the function of the jury to determine the guilt or innocence of the accused according to the evidence, of the truth or weight of which they are to judge, the court should be held bound to instruct them upon a point in respect to which there was no evidence whatever, or to forbear stating what the law is upon a given state of facts, the result would be that the enforcement of the law against criminals and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles. And if it be true that a jury in a criminal case are under no legal obligation to take the law from the court, and may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the presence of both court and jury, contend that what the court declares to be the law applicable to the case in hand is not the law, and, in support of his contention, read to the jury the reports of adjudged cases and the views of elementary writers. Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury. And in a few jurisdictions, in which it is held that the court alone responds as to the law, that practice is allowed in deference to long usage. But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court. Under the contrary view—if it be held that the court may not authoritatively decide all questions of law arising in criminal cases—the result will be that when a new trial in a criminal case is ordered even by this court, the jury, upon such trial, may of right return a verdict based upon the assumption that what this court has adjudged to be law is not law. We cannot give our sanction to any rule that will lead to such a result. We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of

government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

In Virginia, after having been much confused by the timidity with which our courts had dealt with it, the question was finally squarely decided in *Brown v. Commonwealth*, 86 Va. 466, where it was held that the jury are *not* judges of the law; though the question was probably not necessary to the decision. After having decided other instructions erroneous, and that the case must be reversed, there seems to have been no occasion to pass upon the correctness of the instruction with respect to the province of the jury, save to settle the question in future trials. The opinion of Lewis, P., in this case reviews the other Virginia cases on the subject.

SPECIAL PLEA IN THE NATURE OF A PLEA OF SET-OFF.—This is the name given by the Virginia statute, enacted April 16, 1831 (Supp. to Rev. Code, 1819, pp. 157–8), to a right of counter-claim in the nature of recoupment, conferred on the defendant at law when sued on a contract sealed or unsealed, in case of fraud in the procurement of the contract, failure in the consideration thereof, breach of warranty, etc. As re-enacted at the revision of 1887, the law on this subject is found in sections 3299–3304 of the Code of Virginia.

By sec. 3299: "In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter arising under the contract, existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit." And by sec. 3300: "If a defendant, entitled to such plea as is mentioned in the preceding section, shall not tender it, or though he tender it, if it be rejected for not being offered in due time, he shall not be precluded from such relief in equity as he would have been entitled to if the preceding section had not been enacted. If, when an issue in fact is joined thereon, such issue be found against the defendant, he shall be barred of relief in equity upon the matters alleged in the plea, unless upon such ground as will entitle a party to relief against a judgment in other cases. Every such issue in fact shall be upon a general replication that the plea is not true; and the plaintiff may give in evidence, on such issue, any matter which could be given in evidence under a special replication, if such replication were allowed." And by sec. 3301: "Nothing in this chapter shall impair or affect the obligation of any bond or other deed deemed voluntary in law upon any party thereto, or his representatives."

To the plea allowed under sec. 3299, *supra*, secs. 3303 and 3304 are applicable, and the defendant is deemed to have brought an action against the plaintiff

at the time the plea is filed; and if the jury find that the defendant's claim exceeds the plaintiff's demand, the defendant shall have judgment for the excess.

In order fully to understand the above legislation, it is necessary to consider the doctrine of recoupment at common law. For a full discussion of the subject, see 40 Am. Dec. 320–337, note to *Van Epps v. Harrison*, 5 Hill (N. Y.) 63.

The word *recoupment* signifies *cutting down*, and the doctrine applies at common law where by a contract not under seal mutual duties and obligations are laid upon two parties, and one sues for a breach by the other, and the defendant meets the plaintiff's demand by a counter-claim for the breach of duty by the plaintiff, and thus cuts down or reduces the amount of the plaintiff's demand. 3 Bl. Com. (305), n. 19, by Judge Cooley. The common case of recoupment is in actions for goods sold or work done, when the defendant may set up a breach of warranty or a false representation as to the goods, or a defective performance of the work, by way of recoupment of the sum demanded by the plaintiff. See *Dushane v. Benedict*, 120 U. S. 630. And the key-note of the doctrine is struck in *Railroad Co. v. Smith*, 21 Wall. 255, by Field, J., when he says (at p. 261): "All damages directly arising from the imperfect character of the structure, which would have been avoided had the structure been made pursuant to the contract, and for which the defendant might have instituted a separate action against the contractors, were provable against their demand in the present action. The law does not require a party to pay for imperfect and defective work the price stipulated for a perfect structure; and when that price is demanded, will allow him to deduct the difference between that price and the value of the inferior work, and also the amount of any direct damages flowing from existing defects, not exceeding the demand of the plaintiffs. This is a rule of strict justice, and the deduction is allowed in a suit upon the contract to prevent circuity of action."

The common law recoupment differs from the statutory set-off in three important particulars. First, recoupment is confined to matters arising out of and connected with the transaction or contract upon which the suit was brought; secondly, the damages need not be liquidated; and, thirdly, if the defendant's claim exceeds the plaintiff's demand, he cannot in the same action recover the balance. And it may be added that recoupment at common law is a defense provable under the general issue, whereas the statutory set-off can only be proved in Virginia when it is so described in the plea, or in an account filed therewith, as to give the plaintiff notice of its nature. Code Va., sec. 3298; *Baltimore etc. R. Co. v. Jameson*, 13 W. Va. 833; *Sterling Organ Co. v. House*, 25 W. Va., 64, 67 (as to notice of recoupment accompanying the general issue); *Britton v. Turner*, 6 N. H. 481 (26 Am. Dec. 713); note to *Van Epps v. Harrison*, 40 Am. Dec. 322.

Such being the common law of recoupment, applicable to parol contracts only, it will be seen that by the Act of 1831, substantially re-enacted in sec. 3299 of the Code of Virginia, the doctrine of recoupment is recognized, and extended far beyond its common law limits, provided the defendant sets up his counter-claim by *special plea verified by affidavit*. Such a plea is called in the Code of 1887, sec. 3299, a "special plea of set-off," and in the original act of 1831, "a special plea in the nature of a plea of set-off," as has been stated above. But it seems that the rights conferred by the statute are more in the nature of recoupment, as the damages which the defendant is allowed to claim must arise from the same trans-

action as the plaintiff's claim, whereas a set-off may consist of a separate and independent debt. See *American Manganese Co. v. Virginia Manganese Co.*, 1 Va. Law Reg. 119.

The statutory recoupment, however, under sec. 3299 of the Code of Virginia, differs from that at common law in this important particular, that if the defendant's damages exceed the plaintiff's demand, the defendant is entitled to judgment for the excess. See sec. 3304. And in *Huff v. Broyles*, 26 Gratt. 283, it is held that if the buyer of an animal, when sued for the price, files a plea under the statute alleging breach of warranty, and thereby defeats the seller's claim for the price, he cannot afterwards bring an action against the seller for damages incurred in keeping the animal; for such damages could have been recovered under the statutory plea, which is in the nature of a cross-action, and the judgment in the action by the seller can be pleaded in bar of a separate action for additional damages brought by the buyer. For further instances of the use of the statutory plea see *Thornton v. Thompson*, 4 Gratt. 121; *Fleming v. Toler*, 7 Id. 301; *Cunningham v. Smith*, 10 Id. 255.

But the Act of 1831 (and sec. 3299 of the Code of Virginia) does not stop with thus enlarging the scope of recoupment at common law as to unsealed contracts. It extends the doctrine to *instruments under seal*, and allows defenses thereto which the common law excludes. Such are failure of the consideration for the sealed contract, fraud in its procurement (as distinguished from fraud in the execution or *factum*. See *Taylor v. King*, 6 Munf. 358; *Hayes v. Ins. Co.*, 76 Va. 225); mistake therein; antecedent mistake, etc. While these matters may at common law be proved by way of defense to an action on an unsealed contract, they cannot, in the absence of statute, be relied on as a defense to a bond or deed. Hence, in such cases equity alone could grant relief. See *Taylor v. King, supra; Wyche v. Macklin*, 2 Rand. 426; *Tomlinson v. Mason*, 6 Rand. 169; *Webster v. Couch*, 6 Rand. 519; *Christian v. Miller*, 3 Leigh 78; *Fisher v. Burdett*, 21 W. Va. 626; 4 Min. Ins. (3d ed.) 770, 792-3. But by the Virginia statute such defenses are allowed though the contract be under seal, and the defendant may make defense at law by a sworn plea, or may have recourse to equity, as he may prefer. And, because in these cases of sealed instruments, the statute permits at law defenses formerly cognizable in equity alone, it has been called the *Statute of Equitable Defenses*, and the pleas filed under it *Equitable Pleas*. The statute, however, seems primarily designed to enlarge the scope of recoupment, so as to enable both plaintiff and defendant to litigate their claims in a single action; and in so doing it empowers the court of law to pass on *equitable* defenses as well as legal. Thus it is applicable to *unsealed* contracts, as to which the defenses enumerated were allowable at law under the general issue; and as to such contracts the effect of the statute is to enable the defendant to obtain *judgment for the excess*, if his claim shall exceed the plaintiff's demand, which excess, as we have seen, could not be recovered by the defendant by recoupment at common law.

A question has arisen whether sec. 3299, which allows fraud in the procurement of a simple contract, failure of consideration, etc., to be made the subject of a *sworn plea* at law, makes this mode of defense exclusive in these cases, and renders such defenses no longer available *under the general issue*. Such is the view taken in Barton's Law Practice (1st ed. 141, 2d ed. vol. 1, 491); and in *Keckley v. Union Bank*, 79 Va. 458, it is said that the express statutory defenses of failure of

consideration, etc., are now not evidence under *nil debet*, but must be pleaded specially and the plea sworn to—a doctrine to which Prof. Minor gives a dubious assent. See 4 Min. Ins. (3d ed.) p. 770; also p. 798. But the language of sec. 3299 is that the "defendant *may* file a plea," etc., and it would seem that the statute is not intended, in case of a contract not under seal, to *compel* a special sworn plea according to its provisions. This view is taken by Green, J., in *Sterling Organ Co. v. House*, 25 W. Va. 64, where it is said: "I do not understand this act of 1831, allowing special pleas in certain cases where the defense is recoupment, to exclude the defendant from making this defense under the general issue of *non assumpsit*, accompanied by notice thereof to the plaintiff." But the advantage of the sworn plea would usually cause the pleader to prefer to avail himself of his statutory privilege (if such it be), rather than fall back on his common law right.

The original act of 1831 declared that "in all actions at law, founded on contract, whether such contract be by *deed or by parol*, . . . the defendant may file a special plea in bar, . . . alleging . . . any such failure in the consideration thereof," etc. But in the revision of 1849 (Code 1849, ch. 172, sec. 5), the language is: "In any action *on a contract*, the defendant may file," etc. This change of language, with the subsequent words in the statute, "or if the contract be *by deed*," caused it to be contended by counsel in *Fisher v. Burdett*, 21 W. Va. 626, that the W. Va. statute (the same in this respect as that of Virginia) did not authorize a plea of failure of the consideration of a *deed* as a defense at law, on the ground that the words "any contract" meant any contract *not by deed*. But this contention was overruled, the court holding that the words "any contract" include "contracts *by deed* as well as by parol," quoting the language of Judge Lee to that effect in *Watkins v. Hopkins*, 13 Gratt. 743.

It has been stated above that the defense relied on under sec. 3299 is in the nature of recoupment rather than set-off, and must arise from the same transaction as the plaintiff's claim. Doubt had arisen as to this, by reason of the words "or any other matter" interpolated into the statute by Act of the Legislature, approved March 22, 1873 (Acts 1872-'73, ch. 216, p. 196). But in the case of *American Manganese Co. v. Virginia Manganese Co.*, 1 Va. Law Reg., 119, it was decided that the "unliquidated damages based upon a breach of contract other than the contract sued on by the plaintiff, cannot be set up in a plea under sec. 3299 of the Code." The court applied the doctrine of *ejusdem generis*, saying: "The term 'or any other matter' was added so that such purpose ['to prevent one cause of action from being divided into two'] could be fully accomplished by allowing not only the defenses particularly and specifically named in the preceding part of the section, but to allow all defenses of that character or kind based upon such contract, or for injuries growing out of it, to be disposed of in one case."

Another important restriction upon the right to file at law a "plea in the nature of a plea of set-off," was first laid down in *Shiflet v. Orange etc. Society*, 7 Gratt. 297, and is reaffirmed in the recent case of *Mangus v. McClelland*, 22 S. E. Rep. 364. This restriction is that when the relief asked for involves a rescission of the contract, and the reinvestment of the vendor with the title to the property sold, a plea of failure of consideration, false representations, etc., under the statute, cannot be relied on at law, because a court of law is incompetent, from the nature of

its procedure, to grant the relief asked, and resort must still be had to a court of equity. Thus in *Mangus v. McClelland, supra*, this doctrine was applied where the seller of land, to which the buyer had received a deed, sued the buyer on his notes for the balance of the purchase money, and the buyer filed special pleas under the statute, alleging that he had been induced to buy the land by reason of false representations made by the seller's agent, and had been damaged to the full amount of the contract, and asking judgment against the plaintiff for the excess of the damages so sustained by him over and above the amount claimed of him by the plaintiff. These special pleas were declared to be bad on demurrer, for the reason above stated; and this notwithstanding the fact that a deed was filed in the record from the defendant, reconveying the land to the plaintiff and waiving and relinquishing all claim on it on the part of the defendant; and the judgment below against the defendant was affirmed "without prejudice to the right of the defendant to go into a court of equity for such relief, if any, as the circumstances of his case may entitle him to in that tribunal."

While this decision is undoubtedly correct as the law now stands, yet it would seem an improvement in the law so to amend sec. 3299 as to enable a court of law in a case like that of *Mangus v. McClelland* to do "complete justice and that not by halves," by giving to it the power of a court of equity in the premises. For a full discussion of the essential difference between the relief afforded at common law and in equity, based on their diverse theories as to the control exercisable over the parties by the court, see Langdell's Summ'ry Eq. Pl. sec. 40-42.

The latest case on this subject in Virginia is *Sexton v. Aultman*, 22 S. E. Rep., 838, (decided Aug. 1, 1895), in which it is held by the Court of Appeals that where the defendant's plea is filed under sec. 3299 of the Code, the plaintiff may rely on the statute of limitations without specially pleading it. Indeed to such plea the statute of limitations *cannot* be pleaded specially, as it is declared by sec. 3300 that every issue of fact upon such plea "shall be upon a general replication that the plea is not true;" and authority to rely on the statute of limitations without pleading it is plainly conferred by the provision. that "the plaintiff may give in evidence on such issue [*i. e.* "general replication that the plea is not true"] "any matter that could be given in evidence under a special replication, if such replication were allowed."

It may be of interest to add that in the language of Judge Green in *Baltimore &c. R. Co. v. Jameson*, 13 W. Va. 833, "the oldest statutes of set-off are those passed by the Legislature of Virginia." The first statute of set-off was enacted in Virginia February, 1645, (1 Hen. Stat. p. 296), whereas the first English statute was not enacted until 2 Geo. II (1729). And the Virginia statute authorizing "a special plea at law in the nature of a plea of set-off," on grounds that would entitle the defendant to "relief in equity" was passed in 1831, whereas the English Common Law Procedure Act, providing, in sec. 83, for "defense on equitable ground" by plea at law was not enacted until 17 & 18 Victoria (1854). See 5 Rob. Prac., p. 389.

DEATH OF JUDGE RICHARDSON.—Hon. R. A. Richardson, for twelve years a member of the Supreme Court of Appeals of this State, died at his home, in Marion, Wednesday night.

Judge Richardson had been a sufferer from diabetes for many months, and his

death was not unlooked for by his friends. Though he had fought against the insidious disease, it gradually sapped his vitality, and he took to his bed about four weeks ago with the consciousness that he would never arise from it again.

Judge Richardson, who was about sixty-five years of age, was a man well qualified for the high position he held on the judicial bench, and many of his opinions in celebrated cases have been quoted extensively by lawyers in this and other States. Though of a genial, and at times frolicsome disposition, Judge Richardson, when on the bench or otherwise engaged in legal business, was stern and even severe. During his residence in this city as a member of the Supreme Court, he kept to himself a great deal, and mingled but little with the general public. He was, therefore, not very well known, nor understood by the people of this community. He was recognized, however, as a man of sterling qualities, and by those who knew him well he was beloved and held in the highest esteem.

He was a native of Charlotte county. When quite a youth—yet in his teens—he went South, and, enlisting with the United States Government, participated in the Mexican war, serving throughout the struggle with great gallantry. Upon the ratification of peace he was discharged from the army, and, returning to Virginia, taught school in Monroe county, now in West Virginia. During odd hours out of the school-room he read law, and in the early fifties he was appointed Deputy Clerk of the Supreme Court of Appeals at Lewisburg. His rugged common-sense and evident ability soon attracted the attention of the members of the high court, and by their advice he continued his legal studies. He was shortly afterwards admitted to the bar, and moved to Mercer county, where he began to practice. The civil war broke out shortly afterwards, and Judge Richardson enlisted in the volunteer service of this State as a private. He participated in the battles of Manassas and Williamsburg, and was promoted from the ranks, through the degrees, to a colonelcy.

Judge Richardson was elected to the Legislature during the war, and served during the winter months. After the war he settled in Smyth county, making his home at Marion, and in a very short time enjoyed a large and lucrative practice. He became a Readjuster, and in 1877 announced himself as a candidate for Lieutenant-Governor, purposing to run on the debt issue. He withdrew, however, before actively going into the campaign, in favor of General James A. Walker, of Wytheville.

In February, 1882, he was elected to the Bench of the Supreme Court by the Readjuster Legislature, and served with distinction throughout the twelve years of his term. He retired from the bench the 1st of January, this year, and went back to Marion, where, though in ill-health, he resumed his practice. He defended a large case just prior to his last illness, and won it. Deceased never married.—*Richmond Dispatch.*